Calendar No. 1098

98TH CONGRESS
2d Session

SENATE

REPORT
98-577

NATIONAL FISHERIES MARKETING COUNCIL ACT OF 1984

AUGUST 6, 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2160]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2160) to establish a National Fisheries Marketing Council to enable the United States fish industry to establish a coordinated program of research, education, and promotion to expand markets for fisheries products, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF BILL

The bill, as reported, will enable the U.S. fishing industry to establish a coordinated program of research, education, and promotion, including export promotion, to expand markets for U.S. fisheries products. Specifically, the bill will create a National Fisheries Marketing Council, the function of which will be to carry out such a coordinated program.

BACKGROUND AND NEEDS

Over the past three decades, Congress has provided the U.S fishing industry with various management tools to help it become a world leader. Effective control over fishing by foreign distant water fleets in waters off the U.S. coast has been achieved through the Magnuson Fishery Conservation and Management Act, enacted in 1976, and fishing industry development was encouraged through the American Fisheries Promotion Act in 1980. Despite these efforts, the U.S. fishing industry faces continued market problems

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due to foreign competition and aggressive marketing in other food sectors. This bill to establish a National Fisheries Marketing Council was drafted in light of needs for market development to bring about full utilization of United States fishery resources and greater economic stabilization for the seafood industry. By creating greater demand for fish products, this legislation will stimulate the economic development of the U.S. fishing industry.

The importance of market development to the fishing industry has been examined by the Committee with consideration given to the following factors: American food consumption patterns; approaches of agricultural commodity marketing boards; and the impact of State and regional seafood marketing efforts.

A large amount of nonfish protein is consumed in the United States. The average American annually eats 10 times as much red meat as fish. This ratio has not changed in the last 7 years, despite medical evidence linking a diet high in fish products to reduced incidence of cardiovascular disease. A recent study by the Office of Technology Assessment has documented the health and nutritional benefits of fish and fish oil, and studies are currently underway at the National Institutes of Health, the Heart, Lung and Blood Institute, and the Framingham Institute in Massachusetts to develop a better understanding of the preventative health value of seafood.

The seafood industry has been unable to capitalize on the attractiveness of its product to capture a larger share of the American food market. A paper by Prof. Robert Buzzell of Harvard Business School notes that very little money is spent on advertising for seafood, the industry has not been successful in developing new products, and industry managers know little about their markets and their customers. In contrast, other food marketers are supported by large, industry-financed advertising budgets.

A well-coordinated consumer education program would be beneficial to inform Americans of the health benefits, value, variety, and availability of fish products. Such a program would likely build demand for U.S. fish products, and thus move closer to achieving the great potential of our seafood market.

This bill is largely patterned after existing agricultural research and promotion boards. In recent years, producer groups have turned to Congress for statutory authority to facilitate participation in research and promotion efforts. Since 1966, Federal legislation has authorized eight national commodity promotion programs. Six of these boards have been established after approval in an industry referendum: cotton, potato, egg, wheat, wool, and dairy products. Boards for beef and floral products have been statutorily authorized but were never established because of disapproval in the industry referendums.

A Congressional Research Service report of March 22, 1984, summarizes a study indicating that campaigns by the American Dairy Board, a private industry body not comparable to the Council created by this bill, have increased cheese sales by 22.7 million pounds for each million dollar increase in generic advertising. The Committee believes that the same kind of national generic promotion for fish products will be a useful way to increase consumer demand for seafood and provide economic assistance to the fishing industry. This national marketing program is intended to improve sales of fish

products in the United States, and seeks to expand foreign markets for fish products. Generic advertising could be employed overseas to aid in foreign market development for seafood products.

State and regional efforts to market seafood products in the United States have been productive, but small groups operating independently have not been able to influence and direct consumer purchasing patterns on a national scale. The Committee believes that the success of State and regional seafood marketing activities, and limited programs sponsored by the Federal Government, could be translated into even greater economic benefit to the fishing industry if a well coordinated and comprehensive national generic marketing program for fish products is established.

The Committee notes the success of several State and regional marketing programs. The Alaska Seafood Marketing Institute spends $3 to 7 million each fiscal year generically promoting and advertising Alaska's seafood products. This program has been so successful that Alaskan fisherman and processors contribute nearly $500,000 annually, over and above their assessments, in the form of personnel, time and out-of-pocket expenses, to the program. In the southeastern United States, the Virginia Marine Products Commission, the South Carolina Wildlife and Marine Resources Department, Florida Department of Natural Resources, Louisiana Seafood Marketing and Promotions Board, and the Texas Agricultural Extension Service have intitiated successful programs to improve the marketability of seafood products from their States. Regional fisheries development foundations have also undertaken programs to promote U.S. fish products.

Marketing programs have contributed to the growth of fisheries for certain formerly underutilized species. For example, the development of the rock shrimp fishery is substantially a result of education and marketing efforts undertaken by the State of Florida. The Committee recognizes the important role that State and regional marketing and fisheries development programs have played, and should continue to play, both in encouraging technological advances in the harvesting and processing sectors, and in expanding markets for underutilized species. In New England and Alaska, for example, regional development foundations have initiated efforts to begin the commercial production and sale of surimi products derived from red hake and pollock.

The Committee notes that State or regional entities and single companies in an industry composed primarily of small fishing, processing, and wholesaling firms are in a poor position to exert a major influence on national consumption patterns of fish products. Broadscale promotion should be done collectively by the seafood industry and directed by a national fisheries marketing council. It is the opinion of the Committee that the Council to be established by this bill should direct such a research and promotion effort. The Committee is concerned about the $4 billion fisheries trade deficit and believes the Council's activities could help to reduce this deficit.

LEGISLATIVE HISTORY

On November 18, 1983, Senator Stevens introduced S. 1260 on behalf of himself and Senators Hatfield, Hatch, Trible, Pell, Murkowski, Hawkins and Chiles. On February 9, 1984, the Commerce Committee's National Ocean Policy Study held a hearing on the bill in Washington, DC, and on March 23, held a field hearing in Boston, MA. Senator D'Amato was added as a cosponsor of the bill on April 26. The full Committee met in executive session on June 13, and by unanimous voice vote ordered an amended version of S. 2160 favorably reported to the Senate.

SUMMARY OF MAJOR PROVISIONS

Establishment of Council

The establishment of a National Fisheries Marketing Council would be of economic benefit to the U.S. seafood industry. The Council would be established to conduct marketing research, consumer education, and promotion programs for U.S. fish products. Export promotion would be included as part of the Council's responsibilities. The Committee believes that consumer education should be the top priority of the Council. The legislation, as reported, provides the Administrator of the National Oceanic and Atmospheric Administration [NOAA] with the discretion to determine the appropriate procedure for selecting qualified individuals to serve on the Council.

Council functions

The Council will prepare a generic marketing plan designed to increase the demand for domestic fish products. The Committee believes that the Council should design its plan to provide maximum benefit during months when the production of fish products is high and demand is low. In addition, the Committee believes that the plan should address the regional marketing needs of the U.S. seafood industry on a region-by-region and product-by-product basis. It is the belief of the Committee that the Council should not be involved in the scientific development of new products and technologies. These activities are best conducted by private industry and the existing regional fisheries development foundations. The Council should limit its activities to consumer education, promotion and marketing research.

Council membership

The Administrator will serve as a nonvoting member of the Council, and will appoint 15 voting members to serve on the Council. Appointments to voting membership will be limited to individuals with demonstrable knowledge of our experience in the U.S. seafood industry. The Administrator shall appoint the best qualified of the individuals who possess such demonstrable knowledge or experience in the industry. Three voting members (one harvester, one processor, and one marketer) would be selected from each of four areas of the country: The Northeast region, the Southeast region, the Northwest and Southwest regions combined, and the Alaska region. The remaining three voting members will be: An at-

large member with consumer or retail marketing experience, an at-large member with experience in the fishing industry, and an at-large member with expertise in freshwater or inland fisheries. Selection of voting members from different regions, as defined by the National Marine Fisheries Service, is designed to ensure that fishing and processing interests of all areas of the United States will receive ample consideration by the Council.

Council funding

For the first 4 years of its operation, the Council is to be funded by foreign fishing fees ($10 million per year for fiscal years 1984 and 1985 and $4 million for each of the following 2 years) and Saltonstall-Kennedy funds ($4 million per year). These monies are collected from foreign fishermen fishing in the United States' Fishery Conservation Zone and from tariffs on fish products imported into the United States; the Committee believes they are an appropriate source of funding for the Marketing Council. Ninety days prior to fiscal year 1988 the Council is required to survey those persons to be assessed, to determine whether they desire the continuation of the Council and its activities. If continuation is opposed by industry members who it is estimated will contribute 35 percent or more of the expected assessment revenues, the Council will be terminated.

If the results of the survey permit the Council to continue, importers and processors of fish products will be annually assessed 0.2 percent of the price of the fish imported or sold. This assessment will help pay for Council operations.

Exemption from assessments is provided for segments of the fishing industry that file petitions for exemption within one year after the date of the bill's enactment. The Administrator is given the flexibility to determine what constitutes an industry segment. It is, however, the view of the Committee that a "segment of the fishing industry" should be defined to include the portion of the industry that markets the same type of fish or fish product which is prepared and packaged in the same manner. An example of an industry segment is the canned tuna industry. Firms with gross revenues of less than $500,000 will also be exempt from assessments. There will be a cap on the amount of annual assessment that any single firm will be required to pay.

Recognizing the diversity of fish products both within each region and among regions, the bill provides for the return to a given region of 25 percent of the assessments collected there. Funds will be dispensed by the Council to entities within the region, such as reigonal development foundations and regional trade associations. Regional programs may be on a product-by-product or species-by-species basis.

The remaining 75 percent of the funds will be used by the Council for the national generic marketing program for domestic fish products and for administrative costs of the Council. It is expected that administrative costs would represent only a small portion of the Council's budget.

Civil enforcement proceedings

This legislation provides for the use of civil enforcement proceedings by the Council to collect industry assessments. District courts

can enforce and prevent persons from violating the orders of the Administrator. In this regard, the Committee believes that the orders of the Administrator should be used solely for the collection of an assessment or for the assembly of data to be used in the determination of an assessment. The term "order" is not intended to encompass orders for the limitations of production of any type or grade of seafood product.

A system of civil penalities, to be carried out by the Administrator, is set up for penalizing those who violate assessment requirements. In addition, the Administrator is authorized to make investigations to determine whether people affected by this act have engaged in or will engage in practices which constitute a violation of an order.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 10, 1984.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN. The Congressional Budget Office has prepared the attached cost estimate for S. 2160, the National Fisheries Marketing Council Act of 1984.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2160.
2. Bill title: National Fisheries Marketing Council Act of 1984.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation, June 13, 1984.
4. Bill purpose: S. 2160 would establish a National Fisheries Marketing Council to promote fisheries products. The sixteen-member council would include the Administrator of the National Oceanic and Atmospheric Administration (NOAA), and industry and regional representatives. Members of the council would serve without pay, but would be reimbursed for travel and other expenses. The council would have authority to hire an executive director and staff, and enter into contracts as necessary to administer the council's functions.

S. 2160 would establish a revolving fund to carry out the activities of the council. Initially, funding would be provided by amounts transferred, subject to appropriations action, from two existing funds—$10 million in each of the fiscal years 1985 and 1986, and $4 million in each of the fiscal years 1987 and 1988, from the Fisheries

Loan Fund, and $4 million in each of the fiscal years 1985 through 1988 from the permanent fisheries account created by the Saltonstall-Kennedy Act.

Beginning in fiscal year 1988, an assessment would be imposed upon certain persons in the fishing industry whose gross revenues exceeded $500,000 annually. The assessments would be equal to 0.2 percent of the price of fish sold by a harvester or imported into the United States, subject to a ceiling as determined by the Administrator of NOAA. According to Committee staff, beginning in 1989, the revolving fund would operate exclusively from private funding, including assessments and donations, and would no longer require the transfer of funds from other activities, or annual appropriations. The staff also indicated that administrative expenses would be paid from the revolving fund, and that additional appropriations would not be provided for this purpose.

Beginning in fiscal year 1988, the council would be required to conduct a survey to determine whether or not it should continue operating. Based on this survey, if the council were terminated, all sums remaining in the revolving fund would be returned to their original source. S. 2160 also includes provisions outlining certain administrative and judicial enforcement procedures to resolve disputes and violations.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1985	1986	1987	1988	1989
Authorization level	10	10	4	4	.....
Estimated outlays	6	9	6	5	2

S. 2160 would also transfer, subject to appropriations, $4 million in each of the fiscal years 1985 through 1988 from the receipts collected pursuant to the Saltonstall-Kennedy Act. Because current law assumes the obligation of the entire amount of these receipts, the transfer to the council of $4 million in any fiscal year would have no net budget impact. In addition, assuming that collections from private sources would be offset by obligations within the new revolving fund, and would not be subject to appropriation action, the net budget effect of these transactions also would be zero.

According to preliminary estimates, collections from assessments beginning in fiscal year 1987 would be approximately $10–$14 million annually.

The costs of this bill fall within budget function 370.

Basis of estimate

For purposes of this estimate, it was assumed that the amounts authorized in the bill would be appropriated prior to the beginning of each fiscal year.

CBO's estimated costs under current law assume that all receipts collected annually pursuant to the Saltonstall-Kennedy Act would be available for obligation. Therefore, the use of $4 million from these receipts for the National Fisheries Marketing Council would

not authorize appropriations above the level already assumed in current law. As a result, no authorization level is shown in the cost table to reflect this transfer of funds, nor is any outlay effect shown, because it was assumed that the timing of disbursements would not be significantly different as a result of the transfer. In addition, the new assessments imposed upon the fisheries industry beginning in 1987 would offset obligations within the revolving fund, resulting in no net new budget authority or outlays for the estimated $10–$14 million collected annually from the fishing industry.

In contrast, CBO's estimates of costs under current law for the Fisheries Loan Fund assume that only a portion of the estimated $120 million available for appropriation, or about $3 million annually, will be obligated. For this estimate, therefore, we assume that the transfer from the Fisheries Loan Fund to the National Fisheries Marketing Council would be from funds not otherwise obligated. The authorization level in the cost table reflects this transfer. Outlays are estimated at 60 percent the first year, 30 percent the second year, and 10 percent the third year. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1985, as passed by the House, provides appropriations of $2.9 million for the Fisheries Loan Fund. H.R. 5712, as passed by the Senate, includes no budget authority for this purpose.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mary Maginniss.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The purpose of S. 2160, as reported, is to provide for the establishment of a National Fisheries Marketing Council to conduct a program of market research, education, and promotion to expand markets for U.S. fisheries products. Prior to the establishment of the Council, the Administrator will be required to promulgate procedures for establishing the Council. In this regard, the Administrator will be required to promulgate procedures for: selecting members to serve on the Council, determining who is eligible to participate in an industry survey on Council continuation, determining how such a survey should be conducted, determining how industry assessments should be set and collected, determining who is eligible to qualify for an exemption for assessments, determining how the payment of assessments should be enforced, and determining how funds are to be allocated to regional projects.

The requirements outlined above will result in increased economic regulation of the U.S. fishing industry. Individual firms will be required to provide economic data for the determination of assessments, to file paperwork in connection with assessments, to partici-

pate in an industry survey on the Council's continuation, and to petition for exemption from assessments. The Administrator will be subject to similar paperwork requirements and costs associated with the establishment and operation of the Council. The principal impact on privacy relates to mandated access to records and books of businesses covered by industry assessment requirements. These effects are mitigated by the right of any segment of the U.S. fishing industry to obtain exemption from this legislation under section 7. Risks of compromises to privacy are also mitigated by the bill's restriction against the release of confidential data.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

This section provides that the legislation may be cited as the "National Fisheries Marketing Council Act of 1984".

Section 2.—Findings

This section states the reasons why the National Fisheries Marketing Council should be established. The findings emphasize the commercial fishing industry's contribution to the U.S. economy, its potential for an even greater contribution if all U.S. fish resources are fully utilized, the nutritional value of fish products in the American diet, and the problem of mounting an effective generic marketing program within a domestic industry that is small and fragmented.

Section 3.—Purpose

This section states that one of the purposes of the legislation is to strengthen the competitive position of the U.S. commercial fishing industry in the domestic and international marketplace. Other purposes pertain to the education of consumers on the uses and nutritional value of U.S. fish products and the enhancement of seafood product promotion.

Section 4.—Definitions

This section defines the major terms used in the legislation. The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine and freshwater life used for human consumption. It does not include fish used for other purposes (e.g., manhaden used for industrial fish meal and oil).

Section 5.—Establishment of the Council

This section sets forth the composition of the Council. The Council is to be composed of 16 members, including 15 voting members appointed by the Administrator, who is the lone nonvoting member. The Administrator shall determine the manner in which nominations are received and members appointed to the Council. The Committee intends that the Administrator seek recommendations from industry of the most qualified candidates for Council membership. Three voting members (one harvester, one processor and one marketer) would be selected from each of four areas of the country: The Northeast region, the Southeast region, the Northwest and Southwest regions combined, and the Alaska region. The

remaining three voting members will be: An at-large member with demonstrated expertise in the U.S. fishing industry, an at-large member with demonstrated expertise in fisheries, and an at-large member with demonstrated expertise in the consumer and retail segments of the food industry. This section also sets forth the duration of Council membership, the deadline for the Council's first meeting, and the reimbursement policy for Council members' expenses.

Section 6.—Functions and duties of the Council

Subsection (a) of this section directs the Council to propose orders to the Administrator, administer orders issued by the Administrator, submit budgets and reports to the Administrator, and maintain accounting records. It singles out consumer education, domestic and international promotion, research, and development plans in seafood marketing as the primary activity of the Council.

Subsection (b) directs the Council to develop and implement an annual marketing plan. References to private brands or trade names in the plan are forbidden, as well as deceptive acts or practices in behalf of seafood products or concerning the quality, use, or value of competing food products. This subsection specifies the allocation between national generic marketing efforts, on the one hand, and regional projects on the other. During the first several years of the Council's existence, when funding will come entirely from Federal sources, 25 percent of the total funds will be set aside for regional activities, to be spent equally in each of the four areas represented on the Council. If the results of the industry survey in fiscal year 1987 permit the Council to continue, the bulk of the funding thereafter will come from assessments paid by private businesses. After the Council enters this second phase, regional projects in each region are to be financed from 25 percent of the assessments collected from that region. During both phases, the funds not dedicated to regional activities are to be used for the national generic marketing program and Council administrative costs.

The Committee intends that regional projects will be aimed at the expansion of demand for fish species of current or potential economic importance to the region. Eligible recipients for regional funds include regional development foundations or regional trade associations. The section authorizes the Council to hire contractors and professional staff to assist the Council.

Section 7.—Duties of the Administrator

This section authorizes the Administrator to issue orders, promulgate regulations, review the Council's annual marketing plan and budget, provide for the collection of assessments, provide support services to the Council, and make appointments to the Council. NOAA officials and employees, as well as independent accountants and others with access to the information obtained from industry under the legislation, are required by this section to maintain the confidentiality of information. However, confidential information may be disclosed pursuant to a court order. Violation of this confidentiality requirement is subject to a fine of up to $1,000, 1 year's imprisonment, and removal from office. As one means for

protecting confidentiality, the Committee recommends the use of an independent accounting firm to collect and aggregate industry data before the Council receives it.

Subsection (c) is one of the main provisions of the bill, addressing the procedure for determining, collecting, and enforcing industry assessments. Processors are required under paragraph (1) to make their books and records available for purposes of determining the appropirate level of assessments, but for no other purpose. Paragraph (2) calls for the Administrator, beginning in fiscal year 1988, to issue an order for the collection of assessments equal to .2 percent of the price of the fish (1) sold by a harvester to a receiver or (2) imported into the United States. The Committee anticipates that the sale price may, in some instances (e.g., fish harvested and processed in a vertically integrated operation) require the Administrator to determine a constructive sale price for assessment purposes, using public source of information when possible. Persons or firms with gross revenues from fish or fish products less than $500,000 are to be exempt from the assessment requirement and a cap is set on the amount of assessment that any single firm will be required to pay.

In addition, paragraph (2) provides a procedure for enabling certain processors and importers to seek and obtain exemption from industry assessment requirements. If the petition for exemption is submitted by processors or importers who handle over 50 percent of the volume of the fish or fish products in a given segment of the industry, they will not be required to pay an assessment. Provision is also made for raising and lowering the rate of assessment, but each year by no more than .1 percent per sale of fish or fish products.

Subsection (d) provides for judicial enforcement of the Administrator's assessment orders.

Section 8.—Establishment of a revolving fund

This section provides for the establishment of a revolving fund to carry out the activities of the Council. During the first four years of Council operation, monies may be appropriated from the Fisheries Loan Fund ($10 million per year for fiscal years 1984 and 1985 and $4 million for each of the following two years) and from Saltonstall-Kennedy funds ($4 million per year). No Federal funds will be provided for activities of the Council after September 30, 1988. Thereafter, the Council will be funded from industry assessments or contributions by private sources.

Section 9—Continuation of the Council

This section calls for the Council to conduct a survey, 90 days prior to fiscal year 1988, to determine whether those persons to be assessed desire the Council's continuation. If continuation is opposed by industry members who it is estimated will contribute 35 percent or more of the expected assessment revenues, the Council will be terminated.

Section 10.—Administrative review of orders

This section authorizes any person subject to an order to file a written petition with the Administrator stating that the order is

not in accordance with law and seeking modification or exemption. Such person shall be given an opportunity for a hearing upon such petition.

The district court of the United States in any district where such person resides or has his principal place of business are vested with jurisdiction to review the Administrator's ruling on the petition, provided the complaint is filed within 20 days of such ruling.

Section 11.—Civil enforcement proceedings

This section, which deals exclusively with enforcement of assessments, vests the district courts of the United States with jurisdiction to enforce any order or regulation issued pursuant to this bill, and to prevent or restrain any person from violating any such order or regulation.

This section also provides for referral to the Attorney General of civil enforcement actions related to the assessments. It also establishes a system of civil penalties, to be administered by the Administrator, in instances where referral to the Attorney General is unnecessary. Civil penalties from $500 to $5000 per violation are authorized.

Section 12.—Investigations

This section authorizes the Administrator to make any investigations the Administrator deems necessary to carry out the Administrator's responsibilities. This authority includes the power to issue subpoenas, to administer oaths and affirmations, and to take evidence, insofar as it pertains to the enforcement of industry assessments.

Section 13.—Authorization

This section authorizes to be appropriated such sums as are necessary to carry out this act.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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Calendar No. 1149

98TH CONGRESS
2d Session

SENATE

REPORT
98–591

TOY SAFETY ACT OF 1984

AUGUST 9 (legislative day, AUGUST 6), 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2650]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2650) to enable the Consumer Product Safety Commission to protect the public by ordering notice and repair, replacement or refund of certain toys or articles intended for use by children if such toys or articles create a substantial risk of injury to children, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill do pass.

PURPOSE OF THE BILL

The "Toy Safety Act", as reported, amends the Federal Hazardous Substances Act (FHSA) to enable the Consumer Product Safety Commission (CPSC) to order the immediate recall of toys or other articles intended for use by children that contain a defect which creates a substantial risk of injury. The bill will permit the CPSC to use the same procedures to recall hazardous toys and children's articles that it now uses to recall other consumer products.

BACKGROUND AND NEED

Under current law, the CPSC may order the recall of most defective consumer products under the Consumer Product Safety Act (CPSA) as soon as a determination has been made that the product creates a substantial risk of injury to consumers. Section 15 of the CPSA provides that the CPSC may, after opportunity for a hearing, requires the recall of consumer products that:

(1) fail to comply with a consumer product safety rule; or

(2) contain a defect which creates a substantial risk of injury to the public.

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Toys and other articles intended for use by children, such as cribs and playpens, are subject to a more lengthy and cumbersome recall procedure under the FHSA. Under the FHSA, the CPSC may not begin a recall proceeding until it has promulgated a final rule "banning" the toy or article.[1] This rulemaking process often takes 2 or 3 years, thus significantly delaying a recall.[2]

Under present law, the only other way that the CPSC may recall an unsafe toy or children's article is by first undergoing a cumbersome procedure through which the agency "transfers" its regulatory function from the FHSA to the CPSA. This procedure requires the CPSC to issue a final rule, following notice and public comment, finding that it is in the public interest to regulate the risk of injury (*i.e.*, the hazardous toy or article) under the CPSA rather than the FHSA (15 U.S.C. 2079(d).) The CPSC must issue this "transfer" rule before it may begin a recall proceeding under the CPSA. The "transfer" rulemaking procedure may take from 4 to 14 months to complete.[3]

The Toy Safety Act will amend the Federal Hazardous Substances Act to allow the CPSC to order the immediate recall of toys and other articles intended for use by children that contain a defect which creates a substantial risk of injury. The bill will permit the CPSC to use the same procedures to recall hazardous toys and children's articles that it now uses to recall other consumer products. The CPSC will no longer be required to issue a final rule banning a hazardous toy or article before it may begin a recall proceeding. Nor will the CPSC be required to complete a rulemaking proceeding to "transfer" its regulatory functions from one act to another. The bill will thus speed the recall of dangerous toys.

Legislative History

The Toy Safety Act was introduced on May 9, 1984 and referred to the Committee on Commerce, Science, and Transportation. The Consumer Subcommittee held 1 day of hearings on June 8, 1984 in Washington, DC. Testimony was heard from CPSC, the administration, the Toy Manufacturers of America, the American Academy of Pediatrics, Mattel, Inc., the Consumer Federation of America and Consumers Union.

On July 2, 1984, the subcommittee held hearings in Milwaukee and in Madison, WI. Testimony was heard from manufacturers, retailers, and Government officials. Also testifying were representatives of day-care centers, hospitals and consumer organizations.

The Committee reported the bill by a unanimous vote on June 13, 1984.

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[1] *See* 15 U.S.C. 1274(a), (b); *see also* section 2(q)(1) of the FHSA, 15 U.S.C. 1261 (q)(1), which provides that a toy or other children's article is defined as a banned hazardous substance if it has been determined to be a hazardous substance. Section 2(f)(1)(D) of the FHSA, 15 U.S.C. 1261(f)(1)(D), provides that the CPSC may determine that a toy or other children's article is a hazardous substance in accordance with the rulemaking procedures of section 3(e) of the FHSA, 15 U.S.C. 1262(e).

[2] Testimony of Nancy Harvey Steorts, Chairman, Consumer Production Safety Commission, on behalf of the Commission.

[3] Testimony of Nancy Harvey Steorts, Chairman, Consumer Product Safety Commission, on behalf of the Commission.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 16, 1984.

Hon. Bob Packwood,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 2650, the Toy Safety Act of 1984, as ordered reported by the Senate Committee on Commerce, Science and Transportation on June 13, 1984.

Currently, the Consumer Product Safety Commission has recall authority under the Federal Hazardous Substances Act for toys or other children's products in violation of a regulation. S. 2650 would amend this Act to grant the Commission recall authority even if these products are not in violation of a regulation. The Commission has similar authority today to recall toys under the Consumer Product Safety Act of 1973, but that authority must first be transferred from the Federal Hazardous Substances Act to the Consumer Products Safety Act. The need for this transfer procedure would be eliminated under the bill.

It is expected that no additional cost to the federal government or to state or local governments would be incurred as a result of enactment of this legislation.

Sincerely,

Rudolph G. Penner, *Director.*

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation.

Under current law, the procedures that apply to the recall of most consumer products are relatively simple. These procedures do not now apply to toys and other articles intended for use by children, which are subject to a more cumbersome procedure under the Federal Hazardous Substances Act. S. 2650 will simplify the procedures that the CPSC must follow to recall toys or other articles intended for use by children. The bill will thus reduce regulatory burdens, and will result in cost and paperwork savings to the CPSC. The reported bill will not have an impact on the privacy of individuals or businesses.

Section-by-Section Analysis

SECTION 1

The first section of the bill provides the short title of the bill, the "Toy Safety Act of 1984".

SECTION 2

The bill amends section 15 of the FHSA (15 U.S.C. 1274) to permit the CPSC to order public notice about a toy or other article intended for use by children that contains a defect which creates a substantial risk of injury to children because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise. The CPSC may order notice if it determines that notice is required to protect adequately the public from such toy or article intended for use by children. Before making its determination, the CPSC must afford interested persons, including consumers and consumer organizations, an opportunity for a hearing.

If the CPSC determines that notice is required, it may order the manufacturer or any distributor or dealer of such toy or article to take any one or more of the following actions:

1. To give public notice that such defective toy or article contains a defect which creates a substantial risk of injury to children.

2. To mail such notice to each person who is a manufacturer, distributor, or dealer of such toy or article.

3. To mail such notice to every person to whom the person giving notice knows such toy or article was delivered or sold.

The bill also amends section 15 of the FHSA to permit the CPSC to order a recall of a toy or other article intended for use by children that contains a defect which creates a substantial risk of injury to children because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise. The CPSC may order corrective action if it determines that such action is in the public interest. Before making its determination, the CPSC must afford interested persons, including consumers and consumer organizations, an opportunity for a hearing.

The CPSC may order the manufacturer, distributor, or dealer to take whichever of the following actions the person to whom the order is directed elects:

1. If repairs to or changes in the toy or article can be made so that it will not contain a defect which creates a substantial risk of injury to children, to make such repairs or changes.

2. To replace such toy or article with a like or equivalent toy or article which does not contain a defect which creates a substantial risk of injury to children.

3. To refund the purchase price of such toy or article (less a reasonable allowance for use, if such toy or article has been in the possession of the consumer for 1 year or more (i) at the time of public notice under paragraph (1)(A), or (ii) at the time the consumer receives actual notice that the toy or article contains a defect which creates a substantial risk of injury to children, whichever first occurs).

The word "defect" is intended to have the same meaning in section 15 of the FHSA, as amended by this act, as it has in section 15 of the CPSA and regulations promulgated pursuant to such act.[4]

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[4] 15 U.S.C. 2064; defect, 16 C.F.R. 1115.4 (1984). The regulation interpreting the term "defect" as used in the CPSA states:

> At a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended, or fails to perform in accordance with, its design. In addition,

(Continued)

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

The Federal Hazardous Substances Act

Section 15 of that Act

NOTICE AND REPAIR, REPLACEMENT, OR REFUND

SEC. 15. (a)–(b) * * *

(c)(1) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (e) of this section) that any toy or other article intended for use by children that is not a banned hazardous substance contains a defect which creates a substantial risk of injury to children (because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise) and that notification is required to protect adequately the public from such toy or article, the Commission may order the manufacturer or any distributor or dealer of such toy or article to take any one or more of the following actions:

(A) To give public notice that such defective toy or article contains a defect which creates a substantial risk of injury to children.

(B) To mail such notice to each person who is a manufacturer, distributor or dealer of such toy or article.

(C) To mail such notice to every person to whom the person giving notice knows such toy or article was delivered or sold.

An order under this paragraph shall specify the form and content of any notice required to be given under the order.

(2) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (e) of this section) that any toy or other article intended for use by children that is not a banned hazardous substance contains a defect which creates a substantial risk of injury to children (because of the pattern of defect, the number of defective toys or such articles distributed in commerce, the severity of the risk, or otherwise) and the action under this paragraph is in the public interest, the Commission may order the manu-

(Continued)

the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury. . . .

facturer, distributor, or dealer to take whichever of the following actions the person to whom the order is directed elects:

(A) If repairs to or changes in the toy or article can be made so that it will not contain a defect which creates a substantial risk of injury to children, to make such repairs or changes.

(B) To replace such toy or article with a like or equivalent toy or article which does not contain a defect which creates a substantial risk of injury to children.

(C) To refund the purchase price of such toy or article (less a reasonable allowance for use, if such toy or article has been in the possession of the consumer for 1 year or more (i) at the time of public notice under paragraph (1)(A), or (ii) at the time the consumer receives actual notice that the toy or article contains a defect which creates a substantial risk of injury to children, whichever first occurs).

An order under this paragraph may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking the action which such person has elected to take. The Commission shall specify in the order the person to whom refunds must be made if the person to whom the order is directed elects to take the action described in subparagraph (C). If an order under this paragraph is directed to more than one person, the Commission shall specify which person has the election under this paragraph. An order under this paragraph may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States), or from doing any combination of such actions, with respect to the toy or article with respect to which the order was issued.

[(c)] *(d)* (1) No charge shall be made to any person (other than a manufacturer, distributor, or dealer) who avails himself of any remedy provided under an order issued under [subsection (b)] *subsection (b) or (c)* and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or dealer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under [subsection (a) or (b)] *subsection (a), (b), or (c)* with respect to [an article] *a toy, article* or substance may require any person who is a manufacturer, distributor, or dealer of the toy, article or substance to reimburse any other person who is a manufacturer, distributor, or dealer of such toy, article or substances for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

[(d)] *(e)* An order under [subsection (a) or (b)] *subsection (a), (b), or (c)* may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative

designated by such class (or by the Commission if such class fails to designate such a representative).

[(e)] (*f*) For purposes of this section (1) the term "manufacturer" includes an importer for resale, and (2) a dealer who sells at wholesale an article or substance shall with respect to that sale be considered the distributor of that article or substance.

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Calendar No. 1151

98TH CONGRESS
2d Session

SENATE

REPORT
98–592

PROFESSIONAL SPORTS TEAM COMMUNITY PROTECTION ACT

AUGUST 9 (legislative day, AUGUST 6), 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 2505]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2505) to provide a right of first refusal for metropolitan areas before a professional sports team is relocated, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF BILL

The primary objectives of this legislation are to provide stability in the location and relocation of professional sports teams and to ensure that the interests of communities which have supported such teams are considered through an equitable procedure.

BACKGROUND AND NEED

The Professional Sports Team Community Protection Act, S. 2505, was introduced to address the issue of professional sports franchise relocations. As reported with an amendment in the nature of a substitute, this bill establishes a procedure designed to guarantee that the concerns of the Nation's cities are taken into account before those professional sports teams which are subject to the bill are allowed to relocate and provides specific authority under which a football, basketball, or hockey league can deny a franchise relocation.

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This legislation is intended to discourage the unnecessary relocation of any professional sports team which is receiving adequate support from the community in which it plays, and to encourage continuity and stability in the location of such teams. The Committee views with concern the increased frequency of bidding contests among cities for existing professional sports teams which, in most cases, appear not to be in the best interests of such municipalities, and which necessitate the establishment of a procedure by which important community interests are considered in any relocation decision process. In the absence of this legislation, the Committee fears that the competition among cities to attract or keep franchises will continue to escalate, further jeopardizing the stability of sports franchises which are so important to the communities in which they are located.

The importance of a professional sports franchise to a community is evidenced both by the experiences of cities in which franchises are or have been located and by the aggressiveness with which cities without such franchises have pursued them.

Professional sports franchises confer "major league" status to cities, generate revenues and jobs, contribute significantly to civic pride and often enhance local economic development. For these reasons and others, communities have long been willing to make the considerable investment of taxpayers' dollars needed to construct and maintain playing facilities for such franchises. But for these public subsidies, professional sports may not exist.

According to an estimate published in *U.S. News & World Report* (May 21, 1984), at least 50 State and local governments have spent more than $6 billion to build or refurbish stadiums in the past 20 years to attract or keep professional baseball and football teams alone. Moreover, numerous communities are committing themselves to building playing facilities for franchises not yet located there. For example, Buffalo, NY is in the process of beginning construction of a $90 million stadium suitable for baseball use. St. Petersburg, FL, is likely to begin construction of a $60 million domed baseball stadium later this year. Also, Phoenix, AZ is advancing a proposal for its own $90 million domed football and baseball facility. Indeed, the Indianapolis Hoosier Dome was built at a cost of almost $80 million before it lured the Colts franchise from Baltimore.

Some of the problems generated, in part, by this public investment and which arise when a franchise moves are illustrated by the experiences of Oakland and Baltimore. In the case of Oakland, the taxpayers of that city and Alameda County provided a facility for the Raiders now valued at an estimated $75 million. After 22 years in Oakland and 12 years of sold-out attendance in that facility, the Raiders moved to Los Angeles. The city and county are $30 million in debt as a result of Coliseum operations and will pay $1,500.000 per year until the year 2004 to retire the construction bond obligation. Estimates of the economic activity generated by the Raiders, now lost to Oakland, range from $30 million to $180 million annually. The city of Baltimore suffered similarly when the Colts football team relocated in Indianapolis; it is estimated that the franchise generated between $25 and $30 million annually in local economic activity.

The city of Oakland was sufficiently concerned about the loss of the Raiders to commence an eminent domain action in State court

against the team. In that action, the court granted summary judgment in favor of the Raiders, ruling that a professional football franchise could not be acquired under California's eminent domain law. The State trial court's decision was reversed by the California Supreme Court (See *City of Oakland* v. *Oakland Raiders*, 32 Cal 3d 60, 646 P. 2d 835 (1982), which held that the State's eminent domain law authorized the taking of any property, including a professional football team, if a public use could be shown. It went on to hold that acquisition of the Raiders could be for a a valid public use and that the acquisition could be effected by eminent domain if such a use were demonstrated. The court remanded the eminent domain action for a trial on the "public use" issue.

Subsequently, the trial court again ruled against the city, but that decision was once more reversed by the California Court of Appeal. On July 16, 1984, the trial court denied the city's eminent domain claim for the third time, reasoning that there was no reasonable probability the Raiders' franchise would be put to a public use and that the use of eminent domain proceedings here lacked the fundamental fairness element of due process. Oakland has made clear its intention to appeal.

If Oakland ultimately prevails in its eminent domain proceeding, such actions will become commonplace whenever a professional sports team attempts to relocate. A procedure such as the one provided for by this bill, which takes into account important community interests in the relocation process, will reduce the need for communities like Oakland and Baltimore to resort to litigation.

The relocation of professional sports teams from one city to another is not a new phenomenon, having occurred from the inception of professional sports leagues. From a review of past professional sports franchise relocations, however, it appears that before 1958 such relocations were due chiefly to a franchise's lack of financial success in a specific location. With baseball's abandonment of Brooklyn (Dodgers) and New York (Giants) that year, and the relocation of those teams in Los Angeles and San Francisco, respectively, it is clear that financial distress and lack of community support are no longer prerequisites to relocation.

Historically, each of the leagues to which S. 2505 applies—baseball, basketball, football, and hockey—has had rules governing the location and movement of its member teams. Certain events, however, have placed in question the ability of the leagues to enforce these rules;

Although not the most recent, perhaps the most vigorously contested challenge to a league's authority to deny a team transfer began in 1980, when the Oakland Raiders football franchise was moved to Los Angeles over the objections of the National Football League [NFL]. The Los Angeles Coliseum Commission, later joined by the Raiders, brought suit against the NFL, alleging that by enforcing its rule to prohibit the Raiders' move, the NFL violated section 1 of the Sherman Antitrust Act. In 1982, a jury returned a verdict in their favor. At a later damages trial, the Raiders and the Coliseum Commission were awarded, in the aggregate, treble damages of over $49 million.

On appeal, the ninth circuit upheld the verdict, finding that the NFL was not a single entity for purposes of Federal antitrust law and thus could be held liable for conspiring to unreasonably restrain trade by blocking the Raiders' move into another team's territory. (See *Los Angeles Memorial Coliseum Commission* v. *NFL*, 726 F.2d 1381, 1984). On June 19, 1984, the appeals court denied a motion for rehearing. The NFL has indicated its intention to seek review by the U.S. Supreme Court.

The immediate fallout from the Raiders litigation is reflected in the sequence of events leading to the removal of the NFL's Baltimore Colts to Indianapolis. Following the collapse of negotiations with the city of Baltimore and the imminence of passage of legislation by the Maryland legislature giving the city authority to acquire the Colts by eminent domain, the owner of that franchise moved the team to Indianapolis on March 28, 1984. On that date, the eminent domain legislation was signed into law and the city thereafter filed suit in Maryland to commence condemnation proceedings.

The Colts filed suit in Indianapolis Federal court to prevent any interference with its move by the city of Baltimore. Both actions are now pending. The NFL has done nothing with respect to the Colts relocation, judging itself restrained from taking any action because of the ninth circuit's ruling.

Professional football has received a great deal of attention because of the controversial nature of these two moves. In both cases, the teams had received substantial public financial support and fan support. The cities tried, in good faith, to reach an agreement with the team regarding the conditions under which the team would remain in the city. In each instance, however, the team owner deserted the city which had supported the team for so long, in favor of an apparently more lucrative offer, leaving the citizens and public officials of Oakland and Baltimore feeling frustrated and bitter. The problem of franchise relocations, however, has not been restricted to professional football.

Since 1976, when professional basketball's modern era commenced with the merger of the American Basketball Association and the National Basketball Association [NBA], several NBA teams have relocated. In 1979, the Buffalo franchise moved to San Diego and, in 1980, New Orleans' team transferred to Salt Lake City. In 1982, the San Diego franchise sought to move to Los Angeles. When the NBA withheld its approval of the transfer, much litigation ensued, but the matter was resolved when the franchise abandoned its request to move.

In recent weeks, however, the owners of the San Diego Clippers moved that franchise to Los Angeles without first seeking league approval. The NBA has brought suit, not to block the move, but to seek a declaratory judgment that the league may consider its constitution and rules in making a determination as to where its member teams are to be located, that the league be allowed to terminate the Clippers' franchise and for $25 million in damages.

It is the Committee's understanding that the NBA amended its rule on franchise relocations in an effort to meet the objections of the ninth circuit to the type of rule previously applied by both the NFL and the NBA. Regardless of the outcome, the importance of the issue to the parties involved is likely to bring an appeal. Thus, the issue may be

pending in the courts for years. Until there is a final determination, it appears that the Clippers' franchise will operate in Los Angeles.

Professional hockey has also experienced franchise moves since the World Hockey Association was merged into the National Hockey League [NHL] in 1979. In 1980, the Atlantic Flames moved to Calgary, AB. In 1982, the Colorado Rockies, a Denver franchise (it had relocated there from Kansas City in 1976), moved to New Jersey.

More recently, the NHL refused to permit the owner of the St. Louis Blues hockey team to move it out of that city, which has supported the franchise since 1967. Instead, the league located a new owner committed to keeping the team in St. Louis. The NHL is now defending itself in a St. Louis Federal court against a $60 million antitrust suit brought by the previous owner.

Major league baseball, while enjoying perhaps the greatest relative stability in recent years, has experienced numerous franchise relocations as well. In 1961, the Senators moved from Washington, DC to Minneapolis and became the Minnesota Twins. In 1966, the Braves left Milwaukee for Atlanta and in 1968, baseball's Kansas City franchise was transferred to Oakland. In 1970, the Seattle Pilots, a 1969 expansion team, moved from that city to Milwaukee. In 1972, the Nation's Capital lost its second baseball franchise. The Senators, an expansion team awarded to Washington, DC in the same year the original franchise moved to Minneapolis, this time relocated in Arlington, TX. In 1984, the Minnesota Twins were for sale with the high possibility that that franchise could attempt a move. Recently, it was announced that the Twins would be sold but would remain in Minneapolis.

Baseball is probably the one league subject to the provisions of this bill able to exercise its rules regarding franchise relocations, given the fact that the Supreme Court granted it an antitrust exemption in *Federal Baseball Club* v. *National Leagues*, 259 U.S. 200 (1922), a privileged status which it has not accorded to any other professional sports league. In more recent decisions, the court has permitted this anomalous situation to persist.

Although a few of the franchise moves discussed above took place over the objection of the relevant league, most have had league approval. Such league-approved relocations underscore the vulnerability of cities to the flight of sports teams for which they have made significant long-term investments and which generate substantial local revenues and employment. Where a league approves a relocation it is clear that the league's interests and the community's interests are, in most cases, in conflict. Although this legislation grants leagues the authority to deny franchise moves in the first instance, no increase in authority to the leagues alone could provide for the resolution of a conflict between the league's interests and the community's interests.

To the extent, therefore, that a league finds that a proposed relocation is necessary and appropriate, this legislation will provide for further consideration of the community's interests by an independent arbitration board. As stated at the outset, it is the interests of our cities which are of chief concern to the Committee and it is the Committee's belief that this legislation is an appropriate response to the problem of the abandonment of communities by professional sports teams.

At the same time, responsible league actions to prevent moves like those of Oakland and Baltimore of the NFL and San Diego of the NBA should be encouraged. It is not the intent of the Committee to diminish the authority of any league to exercise its rules for purposes of *refusing* to permit a member team to relocate. Instead, the Committee intends to supplement any such existing lawful rules with specific statutory authority enabling a league to deny a franchise move provided that, in doing so, the league carefully considers each of the specific factors enumerated in the bill.

The Committee is sympathetic to the concerns of cities which do not now have a team from a particular sport and which view this legislation apprehensively because it may appear to freeze the status quo. Because the expansion of franchises has fallen short of meeting the demand of such communities, they have been forced to consider attempting to lure teams away from other cities. In the view of the Committee, however, the interests of all cities will be better served by stability in the location of professional sports teams.

Although stability alone will not guarantee that any league will expand to meet the demand of these cities, it is evident that instability in team location is a disincentive to expansion. Absent expansion, cities will continue to increase the bidding for too few teams. In the short run, some cities may benefit at the expense of others and the team owners will surely benefit. In the long run, however, the fans and the city officials will become cynical and professional sports will be the ultimate loser.

Some concerns have been raised regarding the appropriateness of Federal legislation to deal with the issue of sports franchise relocations. Protecting communities from unwarranted franchise moves, however, is of significant public interest, including among other important factors, substantial economic interest.

Nonetheless, it is argued that Congress should not involve itself in matters dealing with under what circumstances a team owner can relocate and what authority the league has to permit or deny a proposed move. There is ample precedent, however, for Federal involvement in matters relating to professional sports. Over the years, Congress has passed laws and the Supreme Court has ruled on cases that have greatly benefited both professional sports leagues and individual team owners.

Ownership of franchises is not an example of an unregulated free enterprise system. Special tax breaks are available to team owners, including allowing owners to depreciate player contracts. Sports leagues, too, have approached Congress to obtain legislative authority to conduct certain activities. Antitrust exemptions have been granted to allow league members to bargain collectively with television networks for broadcast rights and to permit league mergers. These are just a few examples of past Federal "intrusions" into professional sports that have been of substantial benefit to professional sports leagues and team owners. Of course, baseball, with its blanket exemption from the application of the antitrust laws and an absence of a regulatory scheme in lieu thereof, is in a uniquely preferred position in our economic system.

It would hardly be just for Congress to interfere with the free market when it works to the benefit of owners and leagues but to

refrain from providing necessary safeguards for communities whose interests do not always coincide with those of the professional sports leagues and their member teams.

LEGISLATIVE HISTORY

S. 2505 was introduced by Senators Gorton, Boschwitz, Mathias, and Kasten on March 29, 1984. S. 2505 was the subject of 2 days of hearings before the Full Committee. The first hearing was held on April 27, 1984 in Washington, DC; the second hearing was held on May 12, 1984 in Minneapolis, MN. During these hearings, the Committee received testimony from numerous interested parties including representatives of professional sports leagues, players associations, elected city officials and community business leaders.

On June 13, 1984, the Committee ordered S. 2505 reported with an amendment in the nature of a substitute.

SUMMARY OF MAJOR PROVISIONS

As reported, S. 2505, the Professional Sports Team Community Protection Act would:

1. Require that a league determine that a proposed relocation of a professional sports team was necessary and appropriate before a team could relocate.
2. Establish criteria for professional sports leagues to consider when making a determination as to whether a proposed sports team relocation is necessary and appropriate.
3. State that any league with a lawful rule can deny a proposed relocation of one of its member teams without using the criteria established in the bill.
4. Require any person who is granted league approval to relocate a franchise to furnish notice of such a proposed move at least three months before the proposed date of relocation.
5. Require any person intending to relocate a team to deposit a cashier's check in the amount of $50,000 in an escrow account which will be used for activities of the Arbitration Board established in section 7 of the bill.
6. Establish the Professional Sports Team Arbitration Board, a three-member panel, to review *de novo* whether a proposed franchise relocation which has been approved by a professional sports league is necessary and appropriate. The Board hall further determine, if it approves a proposed relocation, the value of the proposed move and, if made, the value of any offer to retain the team in its present location.
7. Establish limitations on the availability and scope of judicial review of actions taken by leagues, the Arbitration Board and communities pursuant to authority provided in the bill.
8. Apply the provisions of S. 2505 to professional baseball, basketball, and hockey leagues.
9. Apply the bill to the NFL unless the NFL expands its membership by two teams, one of which is to be located in Baltimore, MD. If the bill does not apply to the NFL, a 3-year moratorium would be imposed on team relocations.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 27, 1984.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2505, the Professional Sports Team Community Protection Act, as ordered reported by the Senate Committee on Commerce, Science and Transportation, June 13, 1984. We expect that this bill will result in no significant cost to the federal government or to state and local governments.

S. 2505 provides for the creation of a three-member arbitration board whenever there is a proposed relocation of a major league baseball, basketball, football or hockey team to another metropolitan area. The purpose of the board would be to decide if the relocation decision is justified, and its expenses would be paid out of a $50,000 escrow account funded by the person proposing the relocation. This bill would also provide interested parties or the community in which a team is located an opportunity to match the financial offer made by another community or new owner, in order to retain the team in its current location.

These procedures do not involve agencies of the federal government, except for the possibility of judicial review in the district courts. States or localities could participate in the proceedings, but would not be required to—except for the selection of a member of the arbitration board by the governmental authority operating the stadium or by the county in which the stadium is located. Thus, no significant governmental costs are expected to result from enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation.

Professional sports leagues, subject to the provisions of this act and without a lawful league rule, are required to use specific criteria included in S. 2505 in making a determination as to whether a proposed franchise relocation is necessary and appropriate. Further, the bill establishes the authority for creation of a three-member Professional Sports Team Arbitration Board to convene in the event a league approves a proposed franchise move. Any league action in approving a franchise shift is subject to *de novo* review by the Arbitration Board.

Sports team owners receiving league approval to sell or move a franchise are required to submit written notification of intent to relocate, transmit to the appropriate league $50,000 to pay for the activities of the Arbitration Board, and provide all necessary financial records to the Board to assist the Board in determining the appropriateness of a proposed team relocation.

The requirements outlined above will result in increased regulation of professional sports leagues and individual team owners. Some additional paperwork requirements, impacts on personal privacy and some economic impact are imposed on team owners who propose to relocate a franchise.

The Committee intends that the increased regulation of professional sports with respect to franchise relocations will result in greater stability, benefitting the leagues, team fans, and local governments, which often have a substantial economic investment in an existing franchise.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

The first section states that this act may be cited as the "Professional Sports Team Community Protection Act".

Section 2.—Findings and policy

Subsection (a) sets forth congressional findings which recognize the investment of communities in providing and maintaining facilities for professional sports teams, the importance of stability in the location of such teams and the difficulty communities have in providing protection against sports teams relocations.

Subsection (b) states that the policy of Congress in this act is to discourage the unnecessary relocation of any team which is receiving adequate support from the people in the community in which it plays, and to encourage continuity and stability in the location of such teams.

Section 3.—Purpose

It is the purpose of this act to: (1) Provide stability in the location of professional sports teams; (2) provide predictability with respect to the relocation of such teams; and (3) ensure that the interests of communities which have supported such teams are considered through a fair procedure.

Section 4.—Definitions

Section 4 provides definitions for 9 terms used in the bill which are generally self-explanatory. The following are important to note: "community" means the Standard Metropolitan Statistical Area in which the team plays its home games or its assigned territory, whichever is smaller; "league" means an association composed of two or more professional sports teams which, by agreement, have put into effect rules for the conduct of member teams and the regulation of contests in which such teams regularly engage and which has existed more than 7 years; "offer of retention" means any offer made by a person to purchase a team and to continue to locate it in the community in which it then plays, or to provide terms not involving a transfer of ownership which will ensure that such team continues to be located in the community in which it then plays; "person" means any indi-

vidual, partnership, corporation, or any unincorporated association, or any combination or association thereof, or any political subdivision; and "territory" means the geographic area within which a professional sports team has agreed to operate and play the majority of its home games, as defined by the relevant league.

Section 5.—Authority for relocation

Subsection (a) states that no person may relocate any professional sports team unless the relevant league determines that the proposed relocation is necessary and appropriate and, in addition, the relocation has been approved by the Board pursuant to section 7.

Subsection (b) states that the league may make its determination pursuant to its rules, but must specifically consider 9 factors: (1) the adequacy of the team's stadium or arena and the willingness of the stadium or arena authority to remedy any deficiencies; (2) the extent of the team's fan support; (3) the extent to which the team has, directly or indirectly received public financial support; (4) the degree to which the team owner or its management has contributed to any circumstance which might demonstrate the need for relocation; (5) whether the team has incurred net operating losses which threaten its continued financial viability; (6) the degree to which the team has engaged in good faith negotiations with representatives of the community concerning conditions under which the team would remain in such community; (7) whether any other team in its league is located in the community in which the team is currently located; (8) whether the team proposes to relocate to a community in which no other team in its league is located; and (9) whether the stadium or arena authority, if public, is not opposed to such relocation.

In setting forth these factors, the Committee recognizes that whether a particular determination is necessary and appropriate is not a determination which can be made through the application of overly rigid criteria. No one factor should be seen as controlling; instead, all of the factors must be considered, each to be accorded such weight as is deemed appropriate under the circumstances. Although the analysis of certain factors may involve specific legal definitions and precise calculations, the ultimate determination is to be one of equity.

Several of these criteria deserve some explanation. Factor (4) reflects the Committee's concern that team owners may deliberately make decisions regarding the operation or management of the franchise, or its relationship with the community, merely to create an atmosphere which might tend to justify relocation of the team. It is the Committee's intent to discourage such activities. Factor (6) is of particular importance; the Committee wishes to encourage open and ongoing communication between professional sports teams and the communities in which they are located.

Factors (7) and (8) reflect the Committee's belief that, given the limited number of professional sports franchises, it is appropriate to consider whether a team is proposing to relocate from a city in which it is the only team in its league to a community which already has a team. In such a case, fans in the latter community are enriched at the expense of the fans in the former. Conversely, if a team leaves a city with more than one team and relocates in an area without a franchise, the number of fans with access to that sport increases. Although these criteria could be construed to be anticompetitive, they reflect an over-

riding public interest in this particular case. By requiring consideration of these factors, the Committee does not intend that franchises should be located solely on the basis of population. The Committee merely seeks to require that the issue of the degrees of fans' access to any team be considered.

Subsection (c) clarifies that nothing in this section shall affect in any manner a league's decision pursuant to any lawful rule to refuse to allow the relocation of any team in that league or the validity or application of any league rule on any relocation within the community in which the team is currently located.

This subsection reflects the Committee's intent to preserve the right of a league to deny a franchise relocation according to any lawful rule it may have promulgated for that purpose. For instance, major league baseball may continue to deny a team relocation under its current rule. Without expressing any opinion on any pending litigation, if any other league's franchise relocation rule is judicially determined to be valid, that league may deny relocations on the basis of that rule.

Section 6.—Notice of relocation or offer of sale

Section 6 requires any person wishing to relocate a team to give written notice at least 3 months before the proposed date for relocation. It also requires a person furnishing notice to transmit to the league a cashier's check in the amount of $50,000. The league shall deposit such check in an escrow account, to be used for activities of the Board established under section 7. Any unexpended amounts shall be returned.

Section 7.—Arbitration board

Subsection (a) requires the establishment of a Professional Sports Team Relocation Arbitration Board to carry out the activities of this section. The Board shall be composed of three members, to be appointed within 30 days after notice is delivered, as follows: (1) one member by the relevant league, (2) one member by the governmental authority that operates the team's stadium or, if none, by the county in which the stadium is located, and (3) one member by the President of the American Arbitration Association.

No individual may serve on the Board who has or might have a pecuniary interest in any team engaged in the same sport as the team involved or any other team which plays in the same community or in the community of proposed relocation.

The Committee emphasizes that any Board created under this legislation is temporary in nature. After a Board has completed its review of a proposed relocation and made its determination, it ceases to exist unless it has been named as a defendant in a lawsuit. In that event, it would continue to exist only for such time as is necessary to finally resolve the litigation.

Subsection (c) requires any person who intends to relocate a team to, at the request of the Board, provide access to all necessary financial records. The Board may disapprove a proposed relocation if the information is not submitted promptly. Such information shall be kept confidential under subsection (k), unless disclosed pursuant to a court order.

Subsection (d) requires any person wishing to make an offer of retention to do so within 2 months after establishment of the Board. In

the Committee's view, two months is a sufficient period of time for a community to develop an offer of retention. Further delay may place an undue burden on a team's ability to function within a league's schedule.

Subsection (e) states that between 2 and 3 months after notice is given, the Board shall conduct a formal hearing to consider *de novo* whether, on the basis of the factors identified in section 5(b), the proposed relocation is necessary and appropriate and, if so, to take evidence regarding the estimated value of any proposed relocation or offer of retention.

Subsection (f) states that if the Board determines that the proposed relocation is not necessary and appropriate, it shall disapprove the proposed relocation.

Subsection (g) states that after the hearing and not later than 3 months after notice is given, if the Board determines that the proposed relocation is necessary and appropriate, it shall then determine whether any offer of retention is equal to or greater in value than the proposed relocation.

Subsection (h) requires that if the Board determines that it has received an offer of retention which does not involve a change of team ownership and which is of a value equal to or greater than the proposed relocation, it shall disapprove the proposed relocation. If an offer of retention which would involve a change in team ownership is determined to be of a value equal to or greater than the proposed relocation, the Board shall, before approving or disapproving the proposed relocation, send all appropriate information concerning the person making such an offer to the relevant league.

The league shall then determine if that person satisfies its criteria for a transfer of league membership. If so, it shall inform the Board, and the Board shall disapprove the proposed relocation. If not, it shall inform the Board, and the Board shall approve the relocation.

If more than one offer of retention is transmitted to the league, and more than one offeror satisfies its criteria, the league may indicate its order of preference for membership. If the team owner elects to accept any such offer, he must accept the offer preferred by the league.

This subsection is not to be construed as an implicit validation of any league's criteria for membership, present or future. Such criteria must be consistent with any applicable State and Federal law.

Subsection (i) requires the Board, if it determines that the proposed relocation is necessary and appropriate and if it has received no offer of retention which is of a value equal to or greater than the proposed relocation, to approve the relocation.

Subsection (j) provides that the decision of the Board shall become effective 5 days after it is made. This provision is intended to give any aggrieved party sufficient time to obtain a judicial stay of the Board's decision, if appropriate.

Section 8.—Judicial review

Subsection (a) states that, except as provided in this section and section 10(b)(2), no person may bring a civil action seeking judicial review of any act or decision made pursuant to authority specifically provided in this bill. An act or decision by a league under its own lawful rule is not considered an act or decision made pursuant to such authority.

The very limited judicial review provided herein reflects the Committee's belief that it is possible to create a mechanism for the protection of communities' interests without fostering extensive litigation. The review authorized in this section is sufficient to ensure league and Board compliance with this act's procedures, but it is not intended to permit a court to second guess the conclusions reached by either.

Subsection (b) states that only a community aggrieved by a league's decision under section 5 may seek judicial review of the decision, only as to whether the league specifically considered the factors identified in section 5(b).

Subsection (c) states that a person aggrieved by a Board decision under section 7(f) or (g) may seek judicial review of the decision only as to whether the Board specifically considered the factors identified in section 5(b).

Subsection (d) requires any person seeking review to do so within 30 days after the decision was made.

Subsection (e) permits any person aggrieved by any decision made by a league under section 7(h)(2) (membership criteria) or by the Board under section 7(i) (valuation of offers) to seek judicial review to determine whether the decision was arbitrary, capricious or an abuse of discretion, or otherwise violative of applicable law.

Subsection (f) permits any person to bring an action in Federal court to enjoin a failure to comply with this act regarding relocation of a team or a failure to comply with any decision by a league or the Board, unless such decision is the subject of judicial review.

Section 9.—Effect on contracts

Section 9 clarifies that nothing shall affect in any manner any contract between a team and any stadium or other person, unless the contract is inconsistent with section 10.

This provision prohibits teams from attempting to avoid the procedures created by this act relating to relocation by including waiver provisions in their contracts with the stadium or arena authority.

Section 10.—Applicability

Subsection (a) states that this bill applies to any proposed relocation of a professional baseball, basketball, or hockey team if it occurs or is scheduled to occur on or after June 13, 1984.

Subsection (b) also applies this bill to the NFL unless, on or before January 31, 1985, the NFL notifies the Senate Commerce Committee and to the House Energy and Commerce Committee that it intends to expand its membership by two, one of which will be located in Baltimore MD, and that both teams will commence play no later than the 1987 season. A copy shall also be sent to the chief executive officer of the city in which such team will be located.

It is the view of the Committee that one of the new teams should be located in the city of Baltimore because Baltimore is the most recent victim of the unfortunate behavior of professional sports team owners which this bill seeks to curb. The Committee would also be inclined to require that one of the teams locate in Oakland; however, the city of Oakland is currently involved in extensive litigation regarding the relocation of the Raiders and the Committee does not wish to require any action by this legislation which might be construed to render Oakland's case moot.

Without expressing any opinion on issues now involved in litigation, subsection (b) is intended to provide a method by which the NFL may avoid the application of the bill to it and thus avoid the possibility of having its appeal of the ninth circuit's ruling in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 726 F.2d 1381 (1984), rendered moot.

In the event that the NFL decides that it will expand under subsection (b), subsection (c) would impose a 3 year moritorium on team relocations in the NFL. Within those 3 years, it is likely that the U.S. Supreme Court will have either declined to receive the ninth circuit decision or will have reviewed it and thus provide Congress with significant guidance in this area.

Subsection (d) states that a relocation shall be deemed to occur when a team intending to relocate has entered into a lease or contract or a binding commitment with respect to a lease or contract which evidences its intention to relocate. Consequently, the bill shall not apply to a team that has signed such a lease or contract before June 13, 1984, even though it may not play its first game at its new location until after June 13, 1984.

Section 11.—Severability

Section 11 states that if any provision of this bill, or its application to any person or circumstance, is held invalid, the remainder of this bill, or the application of such provision to other persons or circumstances shall not be affected thereby.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following recor' votes during its consideration of S. 2505:

Senator Lautenberg offered an amendment to the substitute amendment to change the definition of the term "community" and to clarify that the bill shall not apply to situations in which teams intending to relocate have already entered into binding leases or contracts at the place of relocation. The Lautenberg amendment was agreed to without objection.

Senator Danforth offered a motion to postpone further consideration of the bill. On a rollcall vote of 8 yeas to 9 nays, the Danforth motion was defeated:

YEAS—8	NAYS—9
Packwood	Kassebaum [1]
Goldwater [1]	Pressler
Danforth	Gorton
Stevens [1]	Kasten [1]
Hollings	Trible [1]
Ford [1]	Long
Riegle [1]	Inouye [1]
Heflin	Exon
	Lautenberg

[1] By proxy.

Senator Danforth offered an amendment to the substitute to make the bill applicable to the NFL, thus eliminating the exemption of the NFL if it expanded by two teams and located one of those teams in Baltimore. By a rollcall vote of 6 yeas to 9 nays, the Danforth amendment was defeated:

YEAS—6	NAYS—9
Packwood	Kassebaum [1]
Goldwater [1]	Pressler
Danforth	Gorton
Stevens [1]	Kasten [1]
Hollings	Trible [1]
Heflin	Long
	Inouye [1]
	Exon
	Lautenberg

Senator Gorton moved to report S. 2505 with an amendment in the nature of a substitute. On a rollcall vote of 9 yeas to 8 nays, S. 2505, with an amendment in the nature of a substitute, was ordered reported:

YEAS—9	NAYS—8
Kassebaum [1]	Packwood
Pressler	Goldwater [1]
Gorton	Danforth
Stevens [1]	Hollings
Kasten [1]	Ford [1]
Trible [1]	Riegle [1]
Long	Exon
Inouye [1]	Heflin
Lautenberg	

[1] By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as repored would make no change to existing law.

ADDITIONAL VIEWS OF MR. LAUTENBERG

I voted to report S. 2505 because I believe that a community should have some means of protecting its investment in a local sports franchise that it is supporting.

I offered an amendment, which was accepted by the Committee, which made two changes in the bill. One ensures that the bill does not apply to a relocation where the team has signed its lease before June 1984, but will not play its first game until September. That would apply to the planned move of the football Jets to New Jersey.

The second part of the amendment makes it clear that a team's community is its league-granted territory or its Standard Metropolitan Statistical Area (SMSA), whichever is smaller. This change has a significant impact in my State, where the Meadowlands Sports Complex has attracted a number of sports teams that have contributed to State pride and a sense of New Jersey identity. Without the amendment, a team could move from the Meadowlands to New York City without invoking the protections of the bill because it would be within a team's territory.

The change would make it clear that for a team located at the Meadowlands, a Northern New Jersey SMSA is its community—and not the greater New Jersey-New York-Connecticut megalopolis. For a long time, the people of my State were forced to root for and identify with teams from neighboring States. The Meadowlands has helped to develop a stronger sense of New Jersey community. The amendment would serve to protect that development.

Although I support the adoption of the community protections incorporated in the bill. I believe that we have yet to address the root of the problem of sports team relocations and the fight among cities for franchises. The basic problem is that there are not enough teams to go around. The number of sports teams is kept artificially low by the collective decisionmaking of league members. Until recently, this collective decisionmaking has operated free of constraint by the antitrust laws. It is unclear how the ninth circuit's decision in the Raiders case applies to league policy on expansion. In addition, that decision does not bind other circuits, and it may be reviewed by the U.S. Supreme Court.

The issue of league expansion is one that we should address. A community that wants a team, that can field a team, and that can support a team, should have a team. I have no doubt that if the Meadowlands officials sought a baseball franchise, the people of New Jersey would support it. In addition, an increased demand for professional athletes would trigger an appropriate response from the youth of America in meeting that demand.

I would concede that arriving at a mechanism to secure additional expansion is not a simple matter. However, I do not believe that this committee will have done justice to the matter of community interests in sports franchises, until it has also addressed the issue of league expansion.

FRANK R. LAUTENBERG.

MINORITY VIEWS OF MESSRS. HEFLIN AND FORD

We feel it is necessary to preface these views on S. 2505 with the affirmation of our belief that Congress should take appropriate action to bring about greater team stability in the professional sports leagues.

Major league sports franchises make dynamic contributions to the economic and cultural life of our Nation's cities and metropolitan areas. In addition to the jobs, tax revenues, and tourist dollars they bring to an area, there are substantial long-term benefits associated with the "major league status" of a city which is home to one or more professional franchises. The positive effects on a community's economic viability and the morale of local citizens are incalculable.

The loss of a major league team can be devastating to a community. Conversely, however, the addition of a franchise can mean a colossal boon—and therein lies the problem we face today. Since it is not economically feasible for the leagues to grant expansion franchises to every city which wants a team, public and private interests in cities throughout the Nation are engaging in bidding wars to either lure or retain major league teams.

The situation has been brought to a point of urgency by the ninth U.S. circuit court's decision in *Los Angeles Memorial Coliseum Commission* v. *National Football League* (726 F.2d 1381, 1984). In this case, the court found that the NFL was not a single entity for purposes of Federal antitrust law. This view effectively invalidated the league's procedure for reviewing team relocations, because approval from a significant majority of teams in the league was required before an individual team could move to a different city.

The ninth circuit decision has brought about a scenario in which the professional sports leagues are prevented from lawfully exercising their powers of administration to act in the public interest and restrict the free movement of teams (the sole exception is Major League Baseball, which has been operating under antitrust immunity granted by the U.S. Supreme Court 62 years ago—see *Federal Baseball Club* v. *National Leagues*, 259 U.S. 200, 1922). We witnessed the serious ramifications of the decision vis-a-vis the NFL in March 1984, when the Baltimore Colts moved to Indianapolis without even prompting an approval vote by the league members. League officials feared that any attempts to stop the Colts from moving would have implications similar to the $50 million dollar judgement that had been upheld by the ninth circuit. It is reasonable to believe that the Colts were well-supported in Baltimore and the NFL would have disallowed the relocation and it found the firm legal footing to do so.

We commend Senator Gorton for the considerable amount of time and effort he has devoted to the search for a legislative solution to this problem. The hearings he has conducted on S. 2505 have yielded a great deal in the way of information about the dangerous situation facing professional sports leagues in light of recent court interpretations of antitrust law.

Regrettably, though, we cannot support the approach of this legislation. S. 2505, as reported by the Committee, contains a number of basic provisions that were not in the version of the bill that was the subject of Committee hearings. These include provisions concerning the expansion of the National Football League, the definition of the types of team moves from a home area to which the bill applies, judicial review of team relocation decisions, the applicability of the bill to team moves that are the subject of pending court cases, and other such matters.

S. 2505 does not directly address (and therefore will not provide a remedy to) the antitrust problems raised by the ninth circuit decision. Instead, it attempts to deal with the issue by granting the leagues authority to restrict team movement, and then limiting judicial review if the leagues consider criteria set forth in the bill during the decision process. This is a tenuous method which sidesteps the issue at hand: the explicit clarification of the Federal antitrust laws as they apply to the collective actions of professional sports league members. Because the bill does not directly clarify the antitrust laws and because repeals of the antitrust laws by implication or inference are not favored even when Congress establishes a regulatory regime over an area of commercial activity (*City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398–99, 1978), S. 2505 will only produce further uncertainty and litigation rather than clarifying the law for States, municipalities, and the professional sports industry.

S. 2505 also needlessly complicates the team relocation issue through the implementation of an administrative procedure designed to supervise the movement of teams. In this respect, the bill seeks to address a problem which wouldn't exist if the antitrust laws were clarified. Prior to the ninth circuit decision, the professional sports leagues exercised a great deal of concern for team stability. The NFL has approved only two franchise relocations since 1950—the transfer of the bankrupt Dallas club to Baltimore in 1953 and that of the Chicago Cardinals to St. Louis in 1960. Major league baseball has provided team stability during the last decade. Although there was considerable team movement during the previous two decades (which, we might add, allowed major league baseball to follow the population shift to the South and the West), Washington, DC is the only city without a replacement team today. The other leagues, hockey, and basketball, also have demonstrated their commitment to team stability, and there is every reason to believe that the leagues would continue to operate in this fashion under an antitrust clarification.

In addition, we have a great deal of concern about the public policy ramifications of this legislation and the precedent Congress would be setting for governmental control of private enterprise. The bill is correctly asserting that there is a great deal of public interest involved in the location of professional sports teams—who is to say that an equal or greater public interest doesn't rest on the location of an automobile factory, electrical appliance plant, or any other major private employer? Previous Congresses have demonstrated a reluctance to address the plant shutdown and relocation issue, and we do not believe this Congress is ready to set regulatory precedent through the professional sports industry.

Finally, we feel it is neither practical nor appropriate for the Congress of the United States to attempt to force the NFL to expand by two franchises and place one of the teams in Baltimore. While we are sympathetic to the distressing situation faced by the citizens and officials of that city regarding the loss of the Colts, such an approach is punitive in nature to the NFL, which has demonstrated that expansion at this time would bring it economic difficulties. The fact that an exemption from the provisions of S. 2505 is being used as an incentive for good behavior leads us to conclude that the entire approach of the bill is castigatory to the professional sports leagues. This is not how Congress should approach the problem.

Rather, we must view the team stability issue as part of a much wider threat to major league sports by recognizing the unique business nature of professional sports leagues. They are not a collection of ordinary business competitors of the same character as a trade association. Although member teams compete vigorously on the field, they are dependent on one another and on the viability of the league to ensure their survival. They have no valid interest in driving each other out of business or maximizing profits at each others' expense. The professional sports league has all the elements of a joint venture, and it must be recognized as such under the law.

In this respect, we must view the team stability problem as only part of a much wider issue: the right of a sports league to make binding collective decisions. Without an antitrust clarification, other league decisions will undoubtedly be brought into the courts. Indeed, the leagues have previously found themselves in court defending their decisions to fire certain umpires, "timeout" rules, and decisions made in the interest of player safety. It is quite possible that future applications of antitrust law could threaten league rules governing organization of leagues into conferences and divisions (for the purpose of promoting inter-city and inter-sectional team rivalries), the scheduling of games, and the placement of expansion teams.

In addition, if the courts continue to hold that member clubs of a league are independent entrepreneurs having a right to maximize revenues and profits without regard to league obligations, then the league's established pattern of revenue sharing will surely collapse. In the NFL especially, the sharing of broadcast and gate revenues is critical to the survival of teams in smaller metropolitan areas and, therefore, to the league itself.

Rather than embarking on the regulatory venture signified by S. 2505, this Congress should take the clear and simple step of providing limited antitrust clarifications which would allow professional sports leagues to keep successful teams where they are and, second, allow the leagues to share revenues to the benefit of teams in the less well-situated markets. In doing so we would be doing much to protect the enormous financial, civic, and emotional investments that taxpayers, fans, and communities make on behalf of their professional sports teams. By recognizing that the members of professional sports leagues are joint ventures engaged in common enterprise, we would eliminate any temptation to enact complicated and unworkable regulatory schemes such as S. 2505.

HOWELL HEFLIN.
WENDELL H. FORD.

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